1954

Roger Belanger v. Lester Rice : Brief of Appellant

Utah Supreme Court

Benjamin Spence; Attorney for Appellants;

9125

In the Supreme Court of the State of Utah

ROGER BELANGER and JESSIE JOCELYN,
Plaintiff and Appellants,

vs.

LESTER RICE,
Defendant and Respondent.

No. ~~8136~~

BRIEF OF APPELLANT

BENJAMIN SPENCE,
Attorney for Appellants

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No. 8136

BRIEF OF APPELLANT

STATEMENT OF FACTS

On or about the 1st day of May, 1952, the plaintiffs and the defendant signed a lease agreement, under the terms of which the plaintiffs leased to the defendant certain premises known as 67 West 7th South St., Salt Lake City, Utah, from the 17th day of March, 1952 to the 17th day of March, 1953, at a monthly re ntal of $75.00 per month, commencing with the 17th day of March, 1952. Exhibit "A," (T-50).

The leased premises consisted of a small restaurant with a counter and about 10 stools. The restaurant and leased premises was located at 67 West 7th South St., Salt Lake City, Utah, and was built in front of a residence up to the sidewalk, and the water was piped in from the residence part to the restaurant part (T. 18).

The premises were originally leased from a William Yeiter and Jean Yeiter, his wife, to the plaintiffs, and the plaintiffs subleased same to the defendant Rice. Defendant went into possession on March 17, 1952 and occupied said premises up to December 1, 1952, and then moved out (T. 18-19). He paid the rent up to December 1, 1952 and delivered the keys to the premises to the plaintiff, Jessie Jocelyn, without any comments other than he was moving out (T. 23-37).

Immediately thereafter the plaintiffs advertised the place for rent and on or about the 8th day of December they obtained a renter for the premises in the person of a Mr. Jones (T. 20). Mr. Jones went into the premises on said day and remained there until December 28, 1952 (T. 22). At the time Mr. Jones took over, the defendant was then living in the premises back of the restaurant which he had rented from Mr. Yieter, the original Lessor with the plaintiffs. Shortly before Jones moved out the defendant, who had the control of the water leading to the restaurant shut off the hot water and without the hot water it was impossible to run the restaurant. The hot water, up to this time, was furnished by the owner of the premises, Mr. Yieter, to the plaintiffs, and the hot water was also provided by the defendant during the time

he occupied the premises and up until Mr. Jones moved in or shortly thereafter, and then was shut off by the defendant (T. 20-39).

Plaintiffs then consulted with Mr. Yieter, the owner of the premises, and he refused to do anything about it (T. 22).

Plaintiffs instituted suit in the Small Claims Court of Salt Lake City against the defendant Rice for the balance of the rent for December, 1952 and the defendant then settled with plaintiffs for this balance, together with costs of advertising the place for rent. The property then remained vacant for the remainder of the lease term, due to the fact that the plaintiffs could not relet the premises without hot water, nor could the plaintiff operate same themselves, which they intended to do (T. 21-22).

On or about January 20, 1953 the plaintiffs commenced an action against the defendant Rice in the City Court of Salt Lake City, Utah, for the rent of said premises for the balance of the term of the lease, to-wit: January, February and to March 17, 1953, and recovered a judgment for the sum of $202.50, costs and attorney's fees in the sum of $75.00 (T. 12-6). Subsequently to this an appeal was taken to the District Court of Salt Lake County, Utah, and a trial de-novo was had thereon. Pending the appeal and before the trial thereof the defendant filed an amended answer in which he sets forth certain facts not pertinent to the issues and which did not constitute a defense affirmatively as stated and alleged therein (T. 14). There was no denial that the defendant vacated the premises on the 1st day of December, 1952, or

offered any excuse or defense for his surrendering the premises. If the court will review the testimony of the defendant and his witnesses as contained in the transcript, there is no assertion or testimony of any kind going to any reason for abandoning the premises, other than the fact that the wife of the defendant, who was operating the restaurant, was in ill health (T. 19) nor was there any testimony or contention on the part of the defendant that there was a mutual recission either by act or conduct on the part of the plaintiffs or any other defense or excuse for abandoning the premises. The court took the matter under advisement at the conclusion of the evidence and later rendered its judgment of no cause of action against the plaintiffs (T. 15). Findings of fact and conclusions of law was entered by the court, merely finding that the rent had been paid up to January 1, 1953 by the defendant. At the conclusion of the trial and pending the decision of the court the plaintiff moved the court for permission to file a supplemental complaint to contain facts which had transpired since the filing of the original complaint (T. 15) and without ruling on the motion or otherwise permitting the filing of said supplemental complaint rendered judgment, from which this appeal is taken.

STATEMENT OF POINTS

POINT I

THE COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF THE RESPONDENT AND AGAINST THE APPELLANTS FOR NO CAUSE OF ACTION.

POINT II

THE COURT ERRED IN NOT RULING UPON THE MOTION OF THE APPELLANTS FOR PERMISSION TO FILE THEIR SUPPLEMENTAL COMPLAINT, OR PERMITTING SAID SUPPLEMENTAL COMPLAINT TO BE FILED BY THE APPELLANTS.

POINT III

THE COURT ERRED IN FAILING TO ENTER JUDGMENT IN FAVOR OF THE APPELLANTS AND AGAINST THE RESPONDENT FOR THE AMOUNT OF RENT OWING BY THE RESPONDENT TO THE APPELLANT FOR THE UNEXPIRED TERM OF THE LEASE AGREEMENT AFTER ABANDONMENT.

POINT IV

THE COURT ERRED IN NOT MAKING FINDINGS OF FACT AND CONCLUSIONS OF LAW BASED UPON SUCH FINDINGS OF FACT TO APPRIZE THE APPELLANTS UPON WHAT REASONING OR FACTS THE COURT RENDERED ITS JUDGMENT AGAINST THE APPELLANTS.

ARGUMENT

POINT I

THE COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF THE RESPONDENT AND AGAINST THE APPELLANTS FOR NO CAUSE OF ACTION.

There is no pleadings in this case either by the original answer of the defendant or by his amended answer which constitutes a defense to the plaintiffs' cause of action, other than a general denial which put this case at issue.

There is no evidence on the part of the defendant or his witnesses which in any manner constitutes a defense to the breach of the lease sued on herein.

Appellant is unable to point out specifically to any testimony on the part of the defendant or his witnesses in the transcript which would raise a defense on his part, either negatively or affirmatively and for that reason I am requesting the Court to review this testimony from the transcript of the evidence before the court in order to sustain the appellants' contention in this respect.

Without having made any findings of fact or conclusions of law as to how the court, or why the court finds in favor of the defendant and against the plaintiffs of no cause of action, otherwise than the presumption that there was a mutual recission of the lease and it is difficult for appellant to present any authorities to meet this situation other than present to the court the law governing an abandonment of a lease agreement by a tenant. While there is no transcript of the court's remarks made at the conclusion of the trial, (other than argument by counsel) (T. 40) the court did inquire of counsel to the effect, can a Lessor sue successively for each month's rent as it becomes due, or did the bringing of the action in the small claims court by the appellant for the rent becoming due in January, 1952 against the defendant preclude the ap-

pellant from further action thereon? The appellant presumes that such was the findings of the court, but the record is entirely silent as to this.

For the purpose of sustaining the position of the appellants, appellants submit the following law generally governing the rights of Lessors to recover from Lessees for an abandonment of the lease and premises, which, in the opinion of the appellants governs the issues of this action.

The respondent, without offering any defense or excuse for abandoning the leased premises, merely informed the appellants that he was going to vacate the premises on the 1st day of December, 1952, because of the illness of his wife (T. 19). He then turned over the keys to the premises to the appellants.

McCoy vs. Celestin, 71 Pac. 2d 936. Calif.

> "It is the established law in this state, that when the lessee of premises vacates them without justification, the leaseor may take possession of the property for the benefit of the tenant and relet the same and thereafter maintain an action for the difference between the sum he has in good faith received from re-leasing the premises and the amount provided for to be paid by the terms of the lease.
>
> In the instant case there was substantial evidence to sustain the trial court's findings that defendant without justification vacated the premises leased by him from plaintiff and that plaintiff did not accept a surrender of the leased premises, but took possession of the same for the benefit of the defendant and released them for his account. 123 Pac. 797; 210 Pac. 430.

32 Am. Jr. 770. Par. 911.

> "The mere entering and taking possession of premises abandoned by a tenant, for the purpose of leasing them, is at best, an equivocal act not amounting to an election by the landlord between an acceptance of surrender terminating the lease and his right to relet for the purpose of mitigating the damages, for which the tenant is liable.
>
> Merely advertising the place for rent cannot be considered as constituting an acceptance of the tenant's surrender, and the fact that a landlord, upon receiving notice of his tenant's intention to vacate before the expiration of the term, enters upon the premises for the sole purpose of placarding them for rent does not terminate the contract.
>
> The institution of an action to recover rent for the period between the time the premises were abandoned by the tenant and the time when they were re-let establishes the fact that the landlord's taking possession was for the purpose of reletting the premises in order to mitigate damages, rather than for the purpose of accepting the surrender and terminating the lease.

The foregoing authorities substantially sustains the position and the acts and conduct of the appellants in their dealings with the defendant pursuant to the evidence as contained in the record of this case.

If the court took the position that the bringing of the action by the appellants in the small claims court precluded them from bringing a further action on this matter, and I am assuming this, the following is the law on that point:

Shea et al. v. Leonis et al, 84 Pac. 2d 277, Calif.

> "It is the settled law that where a lease is repudiated

and the premises abandoned, the landlord has a choice of two remedies: He may rest upon his contract and sue his tenant as each installment of the rent, or the whole thereof becomes dues; or, he may take possession of the premises and recover damages, which will be the difference between what he may be able to rent the premises for and the price agreed to be paid under the lease.

32 Am. Jr. 433, Par. 527:

"A contract to pay money in installments is divisible in its nature, and it is well established that each default in the payment of an installment, may be the subject of an independent action provided it is brought before the next installment becomes due. Accordingly, if under a lease of premises for a definite term rent is payable periodically, the landlord can maintain an action for each installment as it becomes due, without in any way violating the rule forbidding the splitting of causes of action, and therefore without prejudicing his right to sue for future installments as they become due. In other words, recovery for rent for a subsequent period which is not a demand existing at the time of the commencement of a suit for accrued rent, and cannot, under the conditions of the lease, be recovered at that time, is not barred by the recovery for the accrued rent. Separate actions may be brought on the lease for each installment, and a judgment for one installment of rent is not a bar to a second action to recover for a subsequent installment."

24 A.L.R. 891:

"It is too well established to admit of controversy that rent is not due until it is earned, and that an action cannot be maintained to recover rent before it is due

by the terms of the lease. Hence the rule is universal that where the rent for a subsequent period was not a demand existing at the time of the commencement of a suit for accrued rent, and could not, under the conditions of the lease have been recovered at that time, the subsequent action is not barred by the former judgment."

Appellant admits that at the time the action for the rent was commenced in the City Court of Salt Lake City, January 20, 1953, all of the rent for the unexpired term of this lease was not due, but at least the rent for January 1, 1953, and the rent from January 17, 1953 to February 17, 1953, was due and an action could be maintained on this according to the foregoing citation, but before this matter was determined at the conclusion of this case before the District Court, the motion of appellants to file a supplemental complaint to include the rent then long past due before the trial of the case should have been granted in order to avoid a multiplicity of suits.

The foregoing quotations is the law in California, Colorado, Illinois, Indiana, Iowa, Kentucky, Louisiana, Massachusetts, New York, Ohio, Oklahoma, Tennessee, Texas, Vermont and Wyoming.

32 Am. Jur. 777, Par. 915:

"If the rent for the entire period between rent days is payable in advance, a surrender during the period does not operate to discharge the rent or any portion thereof for such period. The theory of this view is that rent payable in advance is considered as accruing on the day on which it is due."

POINT II

THE COURT ERRED IN NOT RULING UPON THE MOTION OF THE APPELLANTS FOR PERMISSION TO FILE THEIR SUPPLEMENTAL COMPLAINT, OR PERMITTING SAID SUPPLEMENTAL COMPLAINT TO BE FILED BY THE APPELLANTS.

As heretofore admitted by appellants, the entire rent for the unexpired term of the lease was not due when the original action was filed in the City Court. The rent from February 17th to March 17th, 1953 was not earned, but at the time of the trail of this case the entire rent was long past due and in order to avoid a multiplicity of actions as the law states, this matter could have been determined in this action and for that reason a motion was made to the court for permission to file this supplemental complaint. See supplemental complaint (T. 15).

Under Rule 15 (d) Utah Rules of Civil Procedure this motion should have been granted.

> (d) SUPPLEMENTAL PLEADINGS: Upon motion of a party the court may upon reasonable notice and upon such terms as are just permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor.

Appellants think it not necessary to go into this question further in view of the foregoing, and it is our opinion that the court abused its discretion in failing to rule on the motion or permit the appellants to file such a supplemental complaint.

It, at no time, raised any new issue in the case, nor did the respondent raise the issue in his pleadings or in the trial of the cause of action.

POINT III

THE COURT ERRED IN FAILING TO ENTER JUDGMENT IN FAVOR OF THE APPELLANTS AND AGAINST THE RESPONDENT FOR THE AMOUNT OF RENT OWING BY THE RESPONDENT TO THE APPELLANT FOR THE UNEXPIRED TERM OF THE LEASE AGREEMENT AFTER ABANDONMENT.

For the reasons as set forth hereinabove in this brief under Points 1 and 2, appellants submits the arguments and the law made and provided governing this matter and points of error as raised by Point III, without further citations or arguments as we believe same is fully covered hereinabove.

POINT IV

THE COURT ERRED IN NOT MAKING FINDINGS OF FACT AND CONCLUSIONS OF LAW BASED UPON SUCH FINDINGS OF FACT TO APPRIZE THE APPELLANTS UPON WHAT REASONING OR FACTS THE COURT RENDERED ITS JUDGMENT AGAINST THE APPELLANTS.

The only argument appellants desire to submit to the court in support of the foregoing Point IV is to refer the court

to the findings of fact and conclusions of law in the record of this case (T. 43-44) which are self-evident and explanatory. It is the contention of the appellants that such findings of fact and conclusions of law are virtually a nullity and do not comply with the following rule:

Rule 52 (a) Utah Rules of Civil Procedure:

> EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall, unless the same are waived find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law *which constitute the grounds of its action . . .*"

Appellants respectfully submit that the judgment of the District Court in the foregoing matter should be reversed and judgment entered for the appellants herein.

Respectfully submitted,

BENJAMIN SPENCE,
Attorney for Appellants